



ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Part 52**

**[EPA-R06-OAR-2016-0673; FRL-9878-01-R6]**

**Air Plan Approval; Albuquerque-Bernalillo County, New Mexico; Excess Emissions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to the Federal Clean Air Act (CAA, the Act), the Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision from the New Mexico Environment Department (NMED) submitted on October 17, 2016, on behalf of the Albuquerque-Bernalillo County Air Quality Control Board (Air Board). The October 17, 2016 submittal is in response to the EPA's national SIP call on June 12, 2015, concerning excess emissions during periods of Startup, Shutdown, and Malfunction (SSM). The submittal requests the removal of the provisions identified in the 2015 SIP call from the New Mexico SIP. EPA is proposing to determine that the withdrawal of the substantially inadequate provisions from the SIP corrects the deficiency identified in the June 12, 2015 SIP call.

**DATES:** Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Submit your comments, identified by Docket No. EPA-R06-OAR-2016-0673 at <https://www.regulations.gov> or via email to [Shar.alan@epa.gov](mailto:Shar.alan@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and

should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Mr. Alan Shar, (214) 665-6691, [Shar.alan@epa.gov](mailto:Shar.alan@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<https://www.epa.gov/dockets/commenting-epa-dockets>.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Mr. Alan Shar, Regional Haze and SO<sub>2</sub> Section, EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270, (214) 665-6691, [Shar.alan@epa.gov](mailto:Shar.alan@epa.gov). Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office may be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

**SUPPLEMENTARY INFORMATION:**

Throughout this document “we,” “us,” and “our” means the EPA.

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## **I. Background**

### **A. EPA's 2015 SSM SIP Action**

On February 22, 2013, EPA issued a Federal Register proposed rulemaking action outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.<sup>1</sup> For each SIP provision that the EPA determined to be inconsistent with the CAA, the EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions.<sup>2</sup> EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the Act to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP

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<sup>1</sup> State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, (78 FR 12460) Feb. 22, 2013.

<sup>2</sup> The term affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” (80 FR 33839, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016. Included was a SIP call to Albuquerque-Bernalillo County, New Mexico, and the detailed rationale for the issuance of that SIP call can be found in the 2015 SSM SIP Action and the preceding proposed actions. The EPA is not reopening the 2015 SSM SIP Action here.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.<sup>3</sup> Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Albuquerque-Bernalillo County, New Mexico in 2015. The 2020 Memorandum did, however, indicate the EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether the EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

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<sup>3</sup> October 9, 2020, Memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced the EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).<sup>4</sup> As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.<sup>5</sup> The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

#### **B. New Mexico's Part 49 Provisions on Excess Emissions**

New Mexico Administrative Code (NMAC), Title 20 Environmental Protection, Chapter 11 Albuquerque-Bernalillo County Air Quality Board, Part 49 Excess Emissions (20.11.49 NMAC) (hereinafter "Part 49") was approved by the EPA into the New Mexico SIP on February 4, 2010, and became federally effective on April 5, 2010.

As a part of the EPA's 2015 SSM SIP Action, the EPA made a finding that certain provisions in Part 49 – namely, 20.11.49.16.A NMAC, 20.11.49.16.B NMAC, and 20.11.49.16.C NMAC of the New Mexico SIP – are substantially inadequate to meet CAA requirements, and thus issued a SIP call with respect to these provisions because these provisions provide for an affirmative defense.<sup>6</sup> Although not part of the finding in

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<sup>4</sup> September 30, 2021, Memorandum "Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy," from Janet McCabe, Deputy Administrator.

<sup>5</sup> Section J, June 12, 2015 (80 FR 33985).

<sup>6</sup> See Affected States in EPA Region VI, section IX.G.4, June 12, 2015 (80 FR 33968).

the 2015 SIP call, the EPA noted that removal of 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC from the New Mexico SIP would render other sections of 20.11.49 NMAC of the New Mexico SIP superfluous and no longer operative.<sup>7</sup>

## **II. Analysis of SIP Submission**

In response to the EPA's June 12, 2015 SIP call, NMED (on behalf of the Air Board) requested by letter dated October 17, 2016, that the EPA approve the removal of 20.11.49 NMAC in its entirety from the New Mexico SIP, including the three provisions found by EPA's June 12, 2015 SIP call to be substantially inadequate to meet CAA requirements.<sup>8</sup> The removal of 20.11.49 NMAC from the New Mexico SIP eliminates the provisions related to excess emissions, including the affirmative defense provisions identified in the June 12, 2015 SIP call. EPA believes that removal of 20.11.49 NMAC from the New Mexico SIP will not affect the adequacy of the remaining portions of the New Mexico SIP.

Although not part of the SIP submittal at issue in this proposed rulemaking, the Air Board amended Part 49 on September 14, 2016, to replace the affirmative defense provisions with "state-only" enforcement discretion provisions. EPA has reviewed the language of 20.11.49 NMAC, as amended, and notes that the enforcement discretion criteria apply only to the State's own enforcement personnel and not to the EPA or others.<sup>9</sup> Therefore, if finalized as proposed, the New Mexico SIP applicable to sources

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<sup>7</sup> More specifically, EPA stated that "removal of 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC from the SIP will render 20.11.49.16.D NMAC, 20.11.49.16.E, 20.11.49.15.B (15) (concerning reporting by a source of intent to assert an affirmative defense for a violation), a portion of 20.11.49.6 NMAC (concerning the objective of establishing affirmative defense provisions) and 20.11.49.18 NMAC (concerning actions where a determination has been made under 20.11.49.16.E NMAC) superfluous and no longer operative, and the EPA thus recommends that these provisions be removed as well." (80 FR 33968, June 12, 2015).

<sup>8</sup> October 17, 2016, submittal letter from NMED Cabinet Secretary to EPA Region 6 Regional Administrator

<sup>9</sup> 20.11.49.16 NMAC states, in part, "The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report ... The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal

located in Albuquerque-Bernalillo County will not include specific provisions relating to excess emissions during SSM periods; however, Part 49, as amended, does provide “state-only” enforcement discretion provisions applicable to excess emissions by such sources and how violations related to excess emissions will be handled by state enforcement personnel.

The submittal also includes an analysis to demonstrate compliance with section 110(l) of the Act.<sup>10</sup> Elimination of the Part 49 provisions from the New Mexico SIP is not expected to lead to any emissions increase. Therefore, we do not believe the proposed revisions would interfere with attainment and reasonable further progress, or any applicable requirement of the CAA. Consequently, we are proposing to approve the removal of 20.11.49 NMAC Excess Emissions from the Albuquerque-Bernalillo County provisions of the New Mexico SIP.

### **III. Proposed Action**

The EPA is proposing to approve a revision to the Albuquerque-Bernalillo County provisions of the New Mexico SIP submitted on October 17, 2016, in response to the EPA’s national SIP call of June 12, 2015, concerning excess emissions during periods of SSM. More specifically, we are proposing to approve the removal of Part 49 Excess Emissions from the Albuquerque-Bernalillo County provisions of the New Mexico SIP. We are proposing to approve these revisions in accordance with section 110 of the Act. EPA is further proposing to determine that such SIP revision corrects the deficiency identified in the June 12, 2015 SIP call. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether this proposed SIP revision is consistent with

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court jurisdiction under Section 113 of the federal act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under Section 113 of the federal act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of Section 304 of the federal act.”

<sup>10</sup> See pdf pages 229-233 of the submittal Docket ID No. EPA-R06-OAR-2016-0673 available at [www.regulations.gov](http://www.regulations.gov).

CAA requirements and whether it addresses the substantial inadequacy in the specific Albuquerque-Bernalillo County provisions identified in the 2015 SSM SIP Action.

#### **IV. Environmental Justice Considerations**

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”<sup>11</sup> EPA is providing additional analysis of environmental justice associated with this action for the purpose of providing information to the public.

EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within Bernalillo County.<sup>12</sup> The EPA then compared the data to the national average for each of the demographic groups.<sup>13</sup> The results of the demographic analysis indicate that, for populations within Bernalillo County, the percent people of color (persons who reported their race as a category other than White alone (not Hispanic or Latino)) is significantly higher than the national average (61.2 percent versus 40 percent). Within people of color, the percent of the

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<sup>11</sup> <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

<sup>12</sup> <https://www.census.gov/quickfacts/fact/table/NM,bernalillocountynewmexico,US/PST045221>.

<sup>13</sup> *Id.*



population that is Hispanic or Latino is higher than the national averages (50.3 percent versus 18.5 percent) and the percent of the population that is American Indian/Alaska Native is also higher than the national average (6.3 percent versus 1.3 percent). The percent of people living below the poverty level in Bernalillo County is higher than the national average (15.3 percent versus 11.4 percent). The percent of people over 25 with a high school diploma in Bernalillo County is similar to the national average (90 percent versus 88.5 percent), while the percent with a Bachelor's degree or higher is slightly higher than the national average (35.3 percent versus 32.9 percent).

Communities in close proximity to and/or downwind of industrial sources may be subject to disproportionate environmental impacts of excess emissions. Short- and/or long-term exposure to air pollution has been associated with a wide range of human health effects including increased respiratory symptoms, hospitalization for heart or lung diseases, and even premature death. Excess emissions during startups, shutdowns, and malfunctions exceed applicable emission limitations and can be considerably higher than emissions under normal steady-state operations. As to all population groups within the Bernalillo County area, as explained below we believe that this proposed action will be beneficial and will tend to reduce impacts. As discussed earlier in this notice, this rulemaking, if finalized as proposed, would result in the removal of the provisions in the New Mexico SIP applicable to Bernalillo County that provide sources emitting pollutants in excess of otherwise allowable amounts with the opportunity to assert an affirmative defense to violations involving excess emissions during startup, shutdown, and malfunctions. Removal of such impermissible affirmative defense provisions from the SIP is necessary to preserve the enforcement structure of the CAA, to preserve the jurisdiction of courts to adjudicate questions of liability and remedies in judicial enforcement actions and to preserve the potential for enforcement by the EPA and other parties under the citizen suit provision as an effective deterrent to violations. If finalized

as proposed, this action is intended to ensure that all communities and populations across Bernalillo County and downwind areas, including people of color and low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by the CAA through the removal of affirmative defense provisions that have interfered with the enforcement structure of the CAA by raising inappropriate impediments to enforcement by states, the EPA, or citizens. We therefore propose to determine that this rule, if finalized, will not have disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

## **V. Incorporation by Reference**

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to Albuquerque-Bernalillo County's regulations, as described in the Proposed Action section above. The EPA has made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and in hard copy at the EPA Region 6 office.

## **VI. Statutory and Executive Order Reviews**

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
  - Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
  - Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
  - Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
  - Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
  - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
  - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
  - Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
  - Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will

not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Particulate matter, Sulfur dioxide, Reporting and recordkeeping requirements, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: June 1, 2022.

**Earthea Nance,**

*Regional Administrator, Region 6.*

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